Ultimately, Menominee County contacted Shawano County to issue the license. (R. 127 at 399.) Menominee County did so because Fry lived just across the border from Menominee County in Shawano County. (*Id.* at 400; R. 126 at 117.) Menominee County informed Shawano County that it was doing a background check of Fry as part of its processing and review of his application. (R. 127 at 403.) Menominee County did not expect that Shawano County, or any other county, would duplicate its background check of Fry. (*Id.* at 405 & 407.)

2. The License Issued By Shawano County.

Shawano County agreed to issue a foster care license to Fry at the request and recommendation of Menominee County. (Ex. 1005; R. 126 at 124.) Shawano County had issued such a license (referred to at trial and on appeal as a "courtesy license") on occasion in the past to Menominee County and two other neighboring counties. (R. 125 at 479.) Shawano County never experienced any problems in issuing courtesy foster care licenses prior to the Fry application. (*Id.* at 482.) Other counties in Wisconsin, including Milwaukee County, the state's most populous county, have issued similar courtesy licenses in the past as well. (R. 127 at 239-40.)

In responding to Menominee County's request in this instance, Shawano County reviewed the foster home study completed by Menominee County, as it represented a summary of all of the work completed by Menominee County on the application at that point. (R. 125 at 480 & 485; R. 126 at 121.) Based on the home study and its past experience with Menominee County, Shawano County believed that a criminal background check had been or

was being done on Fry by Menominee County. (R. 125 at 488; R. 126 at 121-22.) Shawano County did not believe it had any reason to doubt the home study conducted by Menominee County. (R. 125 at 491.)

Shawano County issued the license to Fry on August 21, 1995. (Ex. 1005; R. 126 at 124; R. 125 at 469 & 487.) Under the license, Menominee County was responsible for the placement of any foster children in the home. (Ex. 1005; R. 127 at 399 & 403; R. 125 at 459; R. 126 at 123-24.) Accordingly, Shawano County had no knowledge of whom, if anyone, Menominee County would place in the Fry home at the time it issued the license. (R. 126 at 115 & 118.) Shawano County never placed anyone in the Fry foster home. Further, under the license, Menominee County was responsible for the supervision of the Fry foster home. (R 127 at 399; R. 125 at 459.)

C. Waubanascum's Placement With Fry.

In September 1995, Menominee County placed Waubanascum in the Fry foster home. (R. 127 at 408.) Menominee County continued to have legal custody of Waubanascum even after he was placed in the Fry home. (*Id.* at 409.) Shawano County never had custody of Waubanascum. (R. 125 at 491-92; R. 126 at 119 & 122.) Shawano County was not even advised that Menominee County was placing Waubanascum in the Fry home. (R. 126 at 123.)

In October 1995, a supervisor in the Menominee County Human Services Department learned that a student in the Menominee Indian School District had presented to a local hospital emergency room making allegations of possible sexual contact by Fry. (R. 127 at

412.) Randall Giese, a Deputy Sheriff with the Shawano County Sheriff's Department, was called to the hospital to investigate the allegations. (R. 126 at 151-52 & 159.) Giese informed the Menominee County Department of Social Services of the allegations, which, as is described below, investigated the allegations itself and considered removing Waubanascum from the home. (R. 127 at 412.) Giese also verbally informed an unnamed intake worker at the Shawano County Department of Social Services by telephone of the results of his initial investigation at the hospital, telling the intake worker that the child in question was safe and that he would seek further information. (R. 126 at 162-63.) In the course of his further investigation, Giese learned that Fry had been convicted of disorderly conduct in Illinois under circumstances indicating misconduct on his part with respect to one of his students at the time. (*Id.* at 163-64.)

Neither Ronald Stuber, the Director of Shawano County's Department of Social Services, nor Richard Kane, the Department's Deputy Director, were aware of these allegations against Fry or Deputy Sheriff Giese's investigation before April 1996, when Fry's foster license was revoked. (*Id.* at 112-13 & 141.) There was no evidence introduced at trial suggesting that the allegations regarding Fry were shared with anyone employed by Shawano County other than Deputy Sheriff Giese or the unnamed intake worker at the County's Department of Social Services.

At the time of the October 1995 allegations involving Fry, Waubanascum was in Menominee County's Intensive Supervision Program. Under this program, two licensed social workers from Menominee County had face-to-face contact with Waubanascum seven days a week and with

his foster parent and his school at least once a week. (R. 127 at 413-14; R. 125 at 507-08.) The social workers visited the Fry residence two to three times a week during the entire time Waubanascum was placed in the home. (R. 125 at 508.) There is no higher level of supervision of a foster child by county social workers in Wisconsin. (R. 126 at 126 & 148.)

In the fall of 1995, Menominee County did not perceive any problems with Waubanascum's foster placement based on its daily supervision of him. (R. 127 at 413-15; R. 125 at 508.) According to a Menominee County supervisor, Menominee County believed Waubanascum was doing well in the home in terms of his mental health, his behavior, his school attendance, and his grades. (R. 127 at 413.) Once the allegations against Fry surfaced in October 1995, the two social workers assigned to Waubanascum confronted Waubanascum about the allegations to ask him if he was having any problems. (*Id.* at 414-15.) Waubanascum told the social workers that things were fine and that he wished to remain in the Fry home. (*Id.*; R. 125 at 432 & 510-11.) As a result of the allegations by the other student, Menominee County became even more vigilant in its contacts with and supervision of Waubanascum. (R. 127 at 416.) Menominee County considered removing Waubanascum from Fry's home but it did not do so based on the results of its investigation and its supervision of Waubanascum. (*Id.* at 412-16.)

D. The Removal Of Waubanascum And The Revocation Of The License.

In the spring of 1996, Waubanascum informed one of his Menominee County social workers that Fry had been sexually abusing him. (R. 125 at 511-12 & 493.) Menominee

County removed Waubanascum from the Fry home the same day it learned of the abuse. (R. 127 at 416; R. 125 at 512.)

Shawano County revoked Fry's foster care license on April 30, 1996. (R. 125 at 493.) Shawano County was not aware of any misconduct by Fry, with respect to Waubanascum or otherwise, until the day it revoked his license. (R. 126 at 112-13, 127, & 141-42; R. 125 at 493.) Shawano County had no knowledge of Fry's criminal conduct in Illinois when it issued the license or at any point prior to its revocation of his license. (R. 125 at 492; R. 126 at 127 & 141.)

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT DID NOT MISAPPLY RULE 50 IN REVERSING THE JURY VERDICT AND GRANTING JUDGMENT TO SHAWANO COUNTY.

A. The Rule 50 Standard.

Under Rule 50 of the Federal Rules of Civil Procedure:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

As the Seventh Circuit properly noted, "attacking a jury verdict is a hard row to hoe." (App. at A-19 (quoting *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999)).) Yet, as this Court has long recognized, a mere "scintilla or modicum of conflicting evidence" is decidedly not enough to create an issue that can only be left to a jury for resolution. *See, e.g., A.B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925). Indeed, "a trial judge must direct a verdict [under Rule 50(a)] if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). The same is necessarily true for a federal circuit court of appeals in reviewing a jury verdict on appeal. *See, e.g., Gower v. Vercler*, 377 F.3d 661, 666 (7th Cir. 2004); *McGreevey v. Daktronics, Inc.*, 156 F.3d 837, 840 (8th Cir. 1998).

In its decision in this case, the Seventh Circuit plainly described a standard of review that is wholly consistent with Rule 50. As the Seventh Circuit noted, it was required to view all of the evidence presented at trial in the light most favorable to Waubanascum, as the non-movant. (App. at A-8 (citing *Gower*, 377 F.3d at 666; *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 682 (7th Cir. 1995)).) Further, the Seventh Circuit observed that it was bound to "examine the record as a whole to determine whether there was sufficient evidence from which a reasonable jury could have returned the verdict," but that it could not "reweigh this evidence nor substitute [its] own credibility determinations for that of the jury." (*Id.* (citing *Marshall ex rel. Gossens v. Teske*, 284 F.3d 765, 770 (7th Cir. 2002); *Gower*, 377 F.3d at 666).) Consistent with this Court's reasoning in *Anderson*, however, the Seventh Circuit also noted that

judgment as a matter of law is nonetheless appropriate "[i]f reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim." (*Id.* (citing *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995)).)

B. The Seventh Circuit Properly Applied Rule 50 In Granting Judgment To Shawano County.

The Seventh Circuit did not disregard well-established Rule 50 standards or ignore material evidence heard by the jury, and it properly decided to reverse the jury verdict and grant judgment as a matter of law to Shawano County.

1. The Seventh Circuit Properly Concluded That Shawano County Owed Waubanascum No Constitutional Duty, And The Factual Oversights Now Alleged By Waubanascum Do Not Affect This Conclusion.

In *DeShaney v. Winnebago County Department of Social Services*, this Court held that the Due Process Clause does not require the state to protect the life, liberty, and property of its citizens from deprivation by private individuals and does not act as a guarantee of certain minimal levels of safety and security. 489 U.S. 189, 195 (1989). As the *DeShaney* Court noted, "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

As the lower courts have noted, two exceptions exist to this general rule. *See, e.g., Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998). "One exists if the state has a 'special relationship' with a person, that is, if the state has custody of a person, thus cutting off alternate avenues of aid." *Id.* However, as the *DeShaney* Court itself observed, such a special relationship does not arise simply from the state's knowledge of an individual's predicament; instead, it arises from limitations the state may have imposed on the individual through a restraint on his personal liberty. *DeShaney*, 489 U.S. at 200. The other exception to the general rule of *DeShaney* is the "state created danger" exception, which exists where the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Monfils*, 165 F.3d at 516 (citations and internal quotations omitted); *see also Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

Here, the Seventh Circuit concluded that Waubanascum did not satisfy either exception to the general rule of *DeShaney* based on all of the evidence of record, finding that Waubanascum did not prove either the existence of a "special relationship" between him and Shawano County or that the County affirmatively placed him in a position of danger that he otherwise would not have faced. (App. at A-10 – A-20.)

As is discussed below in Point II below, the Seventh Circuit did not err in reaching these conclusions. At a minimum, Waubanascum's arguments with respect to the Seventh Circuit's application of Rule 50 to the jury verdict do not undermine the Seventh Circuit's determinations in this regard in the least. Indeed, none of Waubanascum's

arguments regarding the Seventh Circuit's supposed disregard of certain trial evidence relates to the existence or non-existence of a duty owing from Shawano County to Waubanascum under the exceptions to *DeShaney*. Absent such a duty, however, there is no basis to hold Shawano County liable under the Due Process Clause. *DeShaney*, 489 U.S. at 197.

On this point, Waubanascum is incorrect in implying that the Seventh Circuit need not have concerned itself with the issue of whether a duty existed under *DeShaney* and instead simply should have considered the general question of whether Shawano County had a policy or custom that "exhibited deliberate indifference to the rights of its citizens." (Petition at 13.) As *DeShaney* made clear, and as the Seventh Circuit correctly noted, the question of whether a constitutional duty exists under the Fourteenth Amendment is a necessary predicate to any claim under the Due Process Clause in this context. Indeed, even the cases cited by Waubanascum acknowledge, in the context of *Monell* claims against a municipalities, that the duty of substantive due process only arises when the municipality either has a special relationship with the plaintiff or affirmatively places him in a position of known danger. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (analyzing a *Monell* failure to train claim against a municipality arising from a failure by police to provide medical care to the plaintiff while she was in police custody); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 723 (3rd Cir. 1989) (noting that *DeShaney* provides that there is "no constitutional duty on the state to provide its citizens with particular protective services" except in limited circumstances where the Constitution imposes "affirmative duties of care and protection" and distinguishing the

claims before it because the plaintiff had suffered abuse at the hands of a government employee rather than a private actor); *Ruge v. City of Bellevue*, 892 F.2d 738, 741-42 (8th Cir. 1989) (acknowledging that the defendant municipality could be liable on a substantive due process claim brought by the mother of a deceased municipal employee if she could show that the city actively placed the decedent into a situation of known danger).

For these reasons, Waubanascum's arguments under Rule 50, standing alone, do not provide a basis for granting the requested writ of certiorari.

2. The Seventh Circuit Also Properly Concluded That Waubanascum Failed To Demonstrate Deliberate Indifference On The Part Of Shawano County.

As the Seventh Circuit noted, Waubanascum had the burden of proving not only that Shawano County owed him a duty under the Due Process Clause but also that, given such a duty, the County exhibited deliberate indifference to his rights. (App. at A-12.) The Seventh Circuit properly concluded that Waubanascum failed to prove such deliberate indifference on the part of the County, and his arguments under Rule 50 do not undermine this conclusion.

The Seventh Circuit applied a "modified" deliberate indifference standard in its analysis, under which it looked to see if a reasonable jury could have concluded that the County had actual knowledge or a suspicion that Waubanascum was likely to suffer abuse or some other serious harm at the hands of his foster parent and then ignored that knowledge or suspicion. (App. at A-12 (citing *J.H.*

ex rel. Higgin v. Johnson, 346 F.3d 788, 792 & 795 (7th Cir. 2003); *K.H.*, 914 F.2d at 852; *Camp v. Gregory*, 67 F.3d 1286, 1293 (7th Cir. 1995)).)[1] Furthermore, because Waubanascum's claims were against Shawano County, he was also subject to the burden of proof imposed generally with respect to § 1983 claims against municipal entities. *See, e.g., Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) (holding that, to establish municipal liability under § 1983, a plaintiff must demonstrate the existence of a municipal policy or custom that caused the deprivation of his constitutional rights). Under these standards, the Seventh Circuit properly found that Waubanascum had not established § 1983 liability on the part of the County either with respect to its issuance of a foster care license to Fry or its actions following the issuance of the license. (App. at A-12 – A-16.)

a. The Issuance Of The License.

Waubanascum attacks the Seventh Circuit's decision with respect to the issuance of the foster care license to Fry by focusing on the background investigation conducted of Fry before Shawano County issued the license. According to Waubanascum, the jury could reasonably have concluded that the County acted with deliberate

[1] Waubanascum observes that two other circuit courts, the Third and Tenth Circuits, have applied the "professional judgment" standard in evaluating due process claims in the foster care context. (Petition at 12 n.4.) However, Waubanascum does not suggest that this Court should consider the question of whether the modified deliberate indifference standard or the professional judgment standard is more properly applied to the facts of this case. Nor does he explain how the outcome of this case would have been different if the professional judgment standard had been used below.

indifference in issuing the foster care license to Fry in that Shawano County officials were aware of a general risk to foster children in the absence of background checks on prospective foster parents as required by Wisconsin law. In particular, Waubanascum points to the fact that the criminal background check on Fry was not complete at the time Shawano County issued a foster care license to Fry. (Petition at 14.)

As the Seventh Circuit itself noted, however, this argument fundamentally misconstrues the applicable due process standard. Indeed, rather than proving that Shawano County had actual knowledge, or a least a suspicion, that Fry would abuse a foster child placed in his care, Waubanascum rests his argument on the possibility that a greater risk of abuse existed as a result of the County's practice relating to courtesy foster care licenses. However, a finding of deliberate indifference cannot rest on such a mere possibility of risk rather than a subjective awareness of risk that is subsequently ignored. (App. at A-13.) *See also Farmer v. Brennan*, 511 U.S. 825, 837, & 841-42 (1994) (noting that the deliberate indifference standard consists of both an objective and a subjective component and holding, in the jail context, that a public official cannot be held liable unless "the official [is both] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and . . . also draw[s] the inference").

Further, as the Seventh Circuit also correctly observed, Wisconsin law on criminal background checks for prospective foster parents does not create a duty under the Due Process Clause. Thus, even assuming that Shawano County violated the applicable provisions of the state regulations governing the licensing of foster parents in issuing a license to Fry before a criminal background

check was complete (an argument that is suspect given the plain language of HSS 56 of the Wisconsin Administrative Code as it existed in 1995),[2] it is firmly established that state law violations are not sufficient to establish § 1983 liability. *See, e.g., DeShaney*, 489 U.S. at 202; *see also White v. Olig*, 56 F.3d 817, 820 (7th Cir. 1995); *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993); *Martin v. Tyson*, 845 F.2d 1451, 1455 (7th Cir. 1988).

Finally, Waubanascum's argument on this issue also fails given the facts presented at trial. Even when viewed in the light most favorable to Waubanascum, the evidence unquestionably demonstrated that Shawano County did not possess actual knowledge, or even a suspicion, that Fry presented a risk, either generally or to Waubanascum specifically, before it issued him a foster care license.

Indeed, while Shawano County issued the foster care license to Fry, it did so at the specific request of neighboring Menominee County. (R. 127 at 399.) At the time it issued the license, Shawano County did so on the basis of the home study conducted by Menomine County. (R. 125 at 480 & 485; R. 126 at 121.) This home study was based in large part on an extensive set of interviews by Menominee County personnel with Fry, as well as an inspection of his home, and a check of his references. (R. 125 at 448, 450, 452, & 454.) According to the home study, Fry was a good candidate for the issuance of a foster care license.

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[2] The applicable provisions of § HSS 56 specified only that an applicant for a foster care license was to provide written authorization for the licensing entity to conduct a criminal background check, but they did not outline specifically when or how that check was to be conducted. (Ex. 2 at 4 & 7 (Wis. Admin. Code §§ HSS 56.03(4)(a)(2) & 56.04(4m)(a)); R. 126 at 108; App. at E-4 & E-7.)

(Ex. 1; R. 126 at 108.) In fact, the Menominee County social worker that prepared the study indicated as follows in the "evaluation" portion of the study:

> Mark Fry appears to be a very intelligent and caring individual. His desire to help seems genuine. It is this interviewer's opinion that a child in need who may be academically struggling would receive excellent care from Mr. Fry.

(*Id.*) No problems were indicated in the home care study, and, to the contrary, the study specifically concluded that Fry met the standards set forth under Wisconsin law with respect to foster care licenses. (*Id.*)

Thus, when it issued the license, the County simply did not possess any information that would have led it to conclude, or even suspect, that Fry would engage in sexual abuse of a foster child or would otherwise present a risk as a foster parent. Further, Shawano County never had custody of Waubanascum, and it was not even involved in the process whereby Waubanascum was placed in the Fry home as a foster child. Instead, Menominee County had custody over Waubanascum, and it alone placed him with Fry. (R. 127 at 408-09; R. 125 at 491-92; R. 126 at 119 & 122-23.) Based on these facts, and as the Seventh Circuit properly found, no reasonable jury could have concluded that Shawano County had any knowledge or suspicion of the risk posed by Fry to Waubanascum in issuing the foster care license to Fry.

As to the criminal background check conducted in connection with Fry's application, the evidence indicated that the check undertaken by Menominee County had not yet been completed at the time Shawano County issued

the license to Fry (and that the home care study relied on by Shawano County indicated as much). (Exs. 1002 & 1; R. 125 at 456 & 469; R. 126 at 108.) Further, viewed in the light most favorable to Waubanascum, the evidence at trial showed that the criminal background check conducted by Menominee County did not search for convictions outside of Wisconsin. (R. 127 at 419.) Yet, as the Seventh Circuit observed, none of these facts allowed for a reasonable inference that events would have unfolded any differently had Shawano County done the check itself or if it had waited for the results of the check by Menominee County before it issued the license. (App. at A-14.) Indeed, which county (Menominee or Shawano) requested the check had no bearing on the content of the results. In addition, because the check ultimately came back clear, Fry's license would not have been held up even had Shawano County possessed the results before it issued the license. The fact that the Wisconsin Department of Justice, which conducted the check, did not search for convictions outside of Wisconsin cannot reasonably be construed as anything more than negligence on the part of the State of Wisconsin (rather than a constitutional wrong on the part of the County). (*Id.*)

b. The Monitoring Of The License.

Focusing on the fact that allegations of sexual abuse were first raised against Fry in October 1995 by another minor, Waubanascum contends that a reasonable jury could have concluded that Shawano County acted with deliberate indifference in failing to remove Waubanascum from Fry's home or suspend or revoke Fry's license in the fall of 1995. According to Waubanascum, a reasonable jury could have concluded that Shawano County failed to do so

because of the County's policy with respect to courtesy foster care licenses. (Petition at 15-16.)[3]

Viewed in the light most favorable to Waubanascum, the evidence on this issue showed that on October 21, 1995, Shawano County Deputy Sheriff Randall Giese received an uncorroborated complaint from a child that he had been sexually assaulted by Fry. (R. 126 at 151-52 & 159; R. 127 at 412.) The evidence showed that Giese began to investigate this possible abuse and that he contacted the Menominee County Department of Social Services to warn Menominee County of the allegations in light of the fact that Waubanascum had been placed by Menominee County in Fry's home. (R. 127 at 412.) The testimony at trial reflected that Menominee County reviewed its initial decision to place Waubanascum in Fry's home and decided to leave Waubanascum in the home. Menominee County based this decision on its social workers' questioning of Waubanascum outside the presence of Fry and its daily observations of Waubanascum under its Intensive Supervision Program. (*Id.* at 413-16; R. 125 at 432, 508, & 511.) As the Seventh Circuit noted, "Menominee County retained legal custody of Waubanascum and continued to monitor his status in Fry's home under its highest level of supervision." (App. at A-18.)

At trial, Waubanascum placed great emphasis on Deputy Giese's testimony that he also contacted an intake worker at the Shawano County Department of Social Services and advised this person of the allegations made

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[3] Waubanascum makes this argument despite the fact that his counsel repeatedly represented at trial that he did not intend to pursue a claim against Shawano County for failing to monitor Waubanascum's placement in Fry's home. (*See, e.g.*, R. 126 at 126, 147, & 153-54.)

against Fry by the other child. Based on this testimony, the jury was invited to believe that they could find that Shawano County acted with deliberate indifference with respect to Waubanascum and thus violated his constitutional rights based on the conduct of Deputy Giese and this unidentified intake worker.

This evidence was an insufficient basis of § 1983 liability against Shawano County, a municipal entity, for three principal reasons. First, Waubanascum did not present any evidence that would have allowed for a reasonable inference that Shawano County had a policy or custom of any kind of failing to investigate alleged incidents of abuse within foster homes licensed by the County. Indeed, on the contrary, the Director of the County's Department of Social Services testified that the County would investigate and take appropriate action with respect to any allegations of abuse in a Shawano County foster home. (R. 125 at 492.) Further, the record reflects that the County terminated Fry's foster care license as soon as Waubanascum's allegations of abuse arose in the spring of 2005. (R. 126 at 112, 127, & 141-42; R. 125 at 493.) Thus, contrary to the most fundamental teachings of *Monell*, no reasonable jury could have concluded that the County had a policy or custom of failing to investigate allegations of abuse within its foster homes. *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (noting that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker").

Second, Waubanascum offered no proof outside of the events relating to his own circumstances at trial. As a

result, no reasonable jury could have concluded that the County was on notice of a problem relating to its supervision of foster care licenses so as to subject it to liability for either encouraging or condoning a series of bad acts on the part of its agents. *See, e.g., Monell*, 436 U.S. at 691 (describing practices so "permanent and well settled as to constitute a 'custom or usage' with the force of law"); *Estate of Novack ex rel. Turbin v. County of Wood*, 226 F.3d 525, 531 (7th Cir. 2000) (describing municipal liability under § 1983 for a custom as requiring a showing of a series of bad acts from which a jury could infer that the municipality was bound to have noticed what was going on and, by failing to do anything, either encouraged or condoned the misconduct).

Finally, Waubanascum did not present any evidence that the information possessed by Deputy Sheriff Giese and allegedly passed from him to an intake worker at the County's Department of Social Services was ever relayed to a policymaker for Shawano County. *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986) (describing a municipal policymaker sufficient to bind a municipality as one who has final decision making authority over the subject at issue). Giese's testimony at trial was that he informed only an unnamed intake worker at the Shawano County Department of Social Services of the status of his investigation. (R. 126 at 162-63.) In addition, Stuber and his deputy, Kane, specifically testified at trial that they were unaware of Officer Giese's investigation or any suspected abuse of Waubanascum until Waubanascum's own allegations of abuse came to light in the spring of 1995. (*Id.* at 112-13, 127, & 141.) As the Seventh Circuit properly observed, in the absence of a single shred of evidence to the contrary, no reasonable jury could have

concluded that a Shawano County policymaker had knowledge of this information and failed to respond. (App. at A-18.)

II. THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT SHAWANO COUNTY DID NOT OWE WAUBANASCUM A DUTY UNDER EITHER OF THE TWO EXCEPTIONS TO *DESHANEY*.

At trial, Waubanascum did not dispute that Shawano County never took him into its custody. Instead, it was undisputed that Menominee County had legal custody over Waubanascum the entire time he was in the Fry home. (R. 126 at 119 & 122; R. 127 at 408-09; R. 125 at 491-92.) Further, Shawano County was not responsible for the placement of children in the Fry home under the foster care license. Rather, Menominee County accepted that responsibility, and Menominee County actually placed Waubanascum in the Fry home. (R. 126 at 123-24; R. 127 at 399 & 403; R. 125 at 459; Ex. 1005.) Indeed, Shawano County had no knowledge that Waubanascum had even been placed in Fry's home. (R. 126 at 115 & 118.) Finally, Menominee County, and not Shawano County, was responsible for supervising the Fry foster home (under its Intensive Supervision Program, no less), and it immediately removed Waubanascum from Fry's care once it learned of his abuse. (R. 127 at 399; R. 125 at 459; R. 126 at 124; Ex. 1005.) Under these circumstances, the Seventh Circuit properly concluded that Waubanascum had not established that Shawano County had a "special relationship" with him or that the County had affirmatively placed him in a position of danger sufficient to implicate either of the exceptions to the general rule of *DeShaney*.

A. The Special Relationship Exception.

With respect to the "special relationship" exception to *DeShaney*, the Seventh Circuit first noted that Waubanascum had not shown that he had ever been in the custody of Shawano County. (App. at A-10.) In so noting, the Seventh Circuit traced Waubanascum's status from the time he was removed from his grandparents' custody through to his removal from the Fry foster home, observing that Menominee County, not Shawano County, had him in its custody and performed any and all protective, investigative, and administrative functions relative to him this entire time. (*Id.*) Thus, contrary to Waubanascum's suggestions, the Seventh Circuit's decision was anything but the result of a formalistic distinction relying solely on the issue of which county had "legal" custody over him.

In any event, the Seventh Circuit's reasoning on this point is squarely in line with *DeShaney* and is anything but in conflict with the decisions of the other federal circuits on this issue. Indeed, in *DeShaney*, this Court reviewed prior due process decisions, noting that "[t]aken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." 489 U.S. at 199-200. In such instances, this Court explained, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. Further:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through

> incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id.

All of the federal circuit courts have adhered to this line of reasoning in applying the "special relationship" exception first articulated in *DeShaney*. *See, e.g.*, *Rivera v. Rhode Island*, 402 F.3d 27, 34 (1st Cir. 2005) (observing that a special relationship may exist "when the individual is incarcerated or is involuntarily committed to the custody of the state"); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2nd Cir. 1993) (noting that special relationships have been recognized in "custodial relationships such as a prison and inmate or a mental institution and involuntarily committed patient and the relationship between a social service agency and foster child"); *Brown v. Pennsylvania Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3rd Cir. 2003) (noting that the special relationship exception exists "when the state restrains an individual so as to expose the individual to harm"); *Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001) (reasoning that "an exception to the general no-duty-to-act rule arises only if the state takes an individual into custody; if there is no custodial relationship, then the state has no duty to protect"); *Walton v. Alexander*, 44 F.3d 1297, 1303 (5th Cir. 1995) (observing that "only when the state, by its affirmative exercise of power, has custody over an individual *involuntarily or against his will* does a 'special relationship' exist between the individual and the state") (emphasis in original); *Sargi v. Kent City Bd. of Educ.*, 70

F.3d 907, 911 (6th Cir. 1995) (noting that "[a] special relationship can only arise when the *state* restrains an individual") (emphasis in original); *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997) (stating that "the State has a 'special relationship' with those it has taken into custody"); *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004) (noting that "the state owes a duty to protect those in its custody"); *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996) (government created special relationship with alien by paroling him into United States and placing him in its custody); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1280 (10th Cir. 2003) ("Absent involuntary restraint, . . . no duty to protect arises under the special relationship theory"); *Lovins v. Lee*, 53 F.3d 1208, 1210 & 1211 (11th Cir. 1995) (citing examples of special relationships with incarcerated prisoners, involuntarily committed mental patients, and children taken into custody and then placed in foster homes).

The two lone cases cited by Waubanascum do not create a circuit split. In *Horton v. Flenory*, for instance, the Third Circuit concluded that the evidence was sufficient to permit a finding that an individual was in state custody at the time of his fatal beating by the owner of a private club when his liberty had been restrained by the club owner, who was "investigating" a burglary under a delegation of authority from and with the knowledge of the local police. 889 F.2d 454, 458 (3rd Cir. 1989). The Eight Circuit's decision in *Wells v. Walker*, on the other hand, was handed down before this Court's decision in *DeShaney* and neither explains its finding of a constitutional duty under the Fourteenth Amendment nor distinguishes between the special relationship and the heightened danger exceptions. 852 F.2d 368, 371 (8th Cir. 1988).

Further, as the Seventh Circuit observed, the fact that Wisconsin laws and regulations prescribe certain duties with respect to foster care licensing is not sufficient to create a special relationship between Shawano County and Waubanascum. (App. at A-11 – A-12.) Indeed, as is noted above in Point I, state laws do not define the scope of a government entity's duties under the Fourteenth Amendment, and violations of state law are not sufficient to impose liability under § 1983. *See, e.g., DeShaney*, 489 U.S. at 202.

B. The State Created Danger Exception.

Waubanascum contends that the Seventh Circuit should have examined the "state created danger" exception to *DeShaney* in the "overall context" of Shawano County's alleged actions and inactions in this case. (Petition at 20.) Contrary to Waubanascum's suggestions, the Seventh Circuit did just that, and it properly concluded that no due process duty arose under this theory either.

As the Seventh Circuit described the "state created danger" exception to *DeShaney*, a due process duty may exist when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." (App. at A-9 (citing *Monfils*, 165 F.3d at 516; *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002)).) Examining all of the evidence introduced at trial, the Seventh Circuit properly concluded that Waubanascum had not met his burden of proof under this exception to *DeShaney*. Indeed, as the Seventh Circuit recognized, Shawano County issued the foster care license to Fry, but the license made no requirements or limitations as to who

would be placed in the home. To the contrary, the placement of a child in Fry's home was the responsibility of Menominee County, and Shawano County played no role in placing Waubanascum in the home. (App. at A-17.) Thus, as the Seventh Circuit concluded, the evidence at trial was insufficient to show that Shawano County "affirmatively placed Waubanascum into harm's way when it did not even know of Waubanascum's existence at the time it issued the license to Fry." (*Id.* at A-18.)

In reaching this conclusion, the Seventh Circuit relied, in part, on the Tenth Circuit's decision in *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). (*Id.* at A-16 – A-17.) In *Ruiz*, a mother brought suit against employees of the Colorado Department of Human Services after her child died in a state licensed day care facility alleging that the defendants had improperly licensed the facility by conducting an insufficient background investigation. *Id.* at 1178. The Tenth Circuit affirmed the dismissal of the mother's due process claims, concluding that she could not make out a claim under the "state created danger" exception to *DeShaney*. *Id.* at 1183. According to the Tenth Circuit, the license in *Ruiz* did not impose an immediate risk of harm and instead affected the public at large rather than the deceased child. *Id.*

Likewise, as the Seventh Circuit observed here, the Shawano County license to Fry did not present an immediate risk and instead affected the universe of children who were potentially eligible to be placed in Fry's home (by Menominee County) rather than Waubanascum himself. (App. at A-17 – A-18.) Although the license only permitted one placement at a time in Fry's home, it still was not issued specifically for Waubanascum and did not, in and of itself, place Waubanascum in any danger. (*Id.* at

A-17 (citing *Ruiz*, 299 F.3d at 1183).) As a result, the license cannot be said to have resulted in a state created danger under the second exception to *DeShaney*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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